Bakersfield Memorial Hospital *and* International Brotherhood of Teamsters, Local No. 87, AFL–CIO. Cases 31–CA–19878 and 31–RC–6923

November 16, 1994

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On March 29, 1994, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bakersfield Memorial Hospital, Bakersfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[Direction of Third Election omitted from publication.]

[1] The judge did not set forth the tally of ballots from the March 9, 1993 rerun election. The record reflects that among approximately 494 eligible voters, 200 cast votes for Petitioner and 227 cast votes against Petitioner, with 19 nondeterminative challenged ballots.

We adopt the judge's recommendation that the Union's objections to the conduct of this election, which parallel meritorious 8(a)(1) complaint allegations, be sustained. We therefore set aside the second election, sever Case 31–RC–6923 from Case 31–CA–19878, and direct a third election.

Gary Freelen Ellison, Esq., for the General Counsel.
Gary F. Overstreet (Musick, Peeler & Garrett), of Los Angeles, California, appearing for the Respondent Employer.
James Rutkowski, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), and with him on brief *James G. Varga, Esq.*, of Los Angeles, California, appearing for the Union Petitioner.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Bakersfield, California, on October 7, 1993.[1] On July 13 the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing in Case 31–CA–19878, based on an unfair labor practice charge filed on April 16 and amended on May 27, alleging violations of Section 8(a)(1) of the National Labor Relations Act (the Act). On August 4 the Regional Director issued a second supplemental decision, order directing hearing, notice of hearing, and order consolidating cases, consolidating for hearing and decision with Case 31–CA–19878 certain objections to a second or rerun election conducted on March 9 in Case 31–RC–6923.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that have been filed, and on my observation of the demeanor of the witnesses, I enter the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Bakersfield Memorial Hospital (Respondent) has been a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and place of business located in Bakersfield, California, where it engages in operation of a nonprofit hospital. In the course and conduct of those operations, Respondent annually derives gross revenues in excess of $250,000 and, further, annually purchases and receives goods or services valued in excess of $5000 directly from suppliers located outside the State of California. Therefore, I conclude, as admitted in the answer to complaint, that at all times material, Respondent has been a health care institution within the meaning of Section 2(14) of the Act and has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, International Brotherhood of Teamsters, Local No. 87, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The petition in Case 31–RC–6923 was filed on April 16, 1992. As a result of a Decision and Direction of Election, an election was conducted on June 30, 1992, among approximately 475 eligible employees in a unit of:

> All full-time and regular part-time non-professional employees, excluding technical employees, skilled maintenance employees, business office clerical employees, professional employees, guards, managerial employees, confidential employees, and supervisors as defined in the Act.

After resolution of all but 12 of the 73 challenged ballots, a revised tally of ballots stated that 182 votes had been cast for the Union and 195 votes had been cast against representation by it, leaving the 12 remaining challenged ballots not determinative.

One of the Union's objections to the conduct of that election was upheld. As a result, on February 8 a notice of second election issued, setting March 9 as the date for a second or rerun election. Between those dates, Director of Human

[1] Unless stated otherwise, all dates occurred in 1993.

Resources Roby Hunt, an admitted statutory supervisor and agent of Respondent since June 1, 1992, when he had commenced working for it, conducted a total of 34 meetings with groups of eligible employees. Both the complaint and the objections allege that, during those meetings, Hunt made express and implied promises of wage and/or benefit increases to dissuade employees from supporting the Union and, also, solicited from them grievances and complaints, implying that Respondent would act favorably with regard to those grievances and complaints.

According to the Union's president, Gene Kelly, the Union had leafleted at the entrance/exit to Respondent's employee parking lot for 8 to 10 days before the election. That activity culminated during the afternoon of March 8, the day before the representation election, with a rally on the 34th Street perimeter of that parking lot. At that rally union supporters marched on the sidewalk the length of Respondent's property. Leaflets and balloons were offered to occupants of vehicles departing from work that afternoon. The complaint alleges, and the Union objects, that Respondent unlawfully engaged in surveillance of those activities by surveilling them through binoculars from the hospital's rooftop, by photographing them, and by recording license plate numbers of vehicles whose occupants accepted leaflets and/or balloons, or who otherwise displayed support for the Union.

Respondent denies having engaged in any unlawful or objectionable conduct. However, for the reasons set forth post, I conclude that a preponderance of the credible evidence establishes that Respondent did make express and implied promises of benefit improvements and did solicit employee desires for benefit improvements in the context of those promises. Moreover, I conclude that while there is no credible evidence to support some of the specific acts of surveillance alleged in the complaint and raised by the objections, a preponderance of the evidence does show that by other actions Respondent did engage in unlawful surveillance, or at least unlawfully created an impression of it.

B. *The Preelection Meetings*

For purposes of his presentations to groups of employees with whom he met, Hunt had been provided with what is entitled ''Outline for Small Group Meetings,'' but which is, in reality, a script. After reciting that the meeting's purpose is ''to talk about [the Union's] attempt to organize [Respondent's] non-professional employees,'' the outline covers such subjects as history of the representation proceeding, details of how the March 9 election is to be conducted, and possible consequences of the election's alternative outcomes, as well as strikes, collective-bargaining contracts, financial obligations of representation, effect of representation on Respondent and its relationship with employees, and termination of representation. Its prepared remarks conclude with the observation that ''if only a few [employees] vote, those few could control the future of everyone at [Respondent],'' and with an appeal for employee support: ''[Respondent] asks for your vote and hopes that you mark your ballot in the box labeled NO.''

Neither the General Counsel, in connection with the complaint, nor the Union, in connection with its objections to the March 9 election, challenge the propriety of statements contained in the outline, which was received into evidence as General Counsel's Exhibit 2. However, two witnesses described remarks by Hunt that go beyond those appearing in the outline. And, in the end, he acknowledged having made statements to employees during at least some of those meetings that do not appear in the outline.

Transporter Jeanine Evertse testified that, along with 20 to 25 other employees, she had attended a meeting conducted by Hunt approximately 2 weeks before the election. She testified that, after welcoming the employees, Hunt had said ''that he would like the opportunity to explain to us why we didn't need a union.'' At a later point during the meeting, testified Evertse, Hunt ''asked us what we would like to see in the way of improvements and benefits.'' When no one responded, she testified, Hunt said, ''Well, how about medical, dental, eye and some others that I don't recall.'' According to Evertse, as Hunt enumerated those items, ''He was writing them on a blackboard.''

Asked what Hunt had said about eye or vision benefits, Evertse testified, ''The only thing I recall is that it would be July before he would know if they were going to implement it.'' With regard to what Hunt had said about dental benefits, she testified that the employees already had a dental plan and that, ''It was more or less on the improvements of it.'' However, she acknowledged that, in the course of his remarks, Hunt had made no direct or specific connection between the benefits and keeping the Union out. Indeed, she testified that, during his speech, Hunt did not ''knock the [u]nion.''

Unit secretary, monitor tech, CPR instructor Beth Ann Brentlinger testified that, along with three or four other employees, she had attended a meeting conducted by Hunt approximately a week before the representation election. He had begun that meeting, she testified, by drawing on a large greaseboard ''a circle and put[ting] the word 'vision' at the top of the circle and the word[s] 'prescription card' to the right of that,'' and wrote the word ''dues'' in the lower right corner. While Brentlinger conceded that ''I cannot quote him word for word,'' she testified that ''he informed us that the hospital was looking into getting us a vision plan and possibly down the road getting us a prescription card plan to enhance our benefits.'' According to Brentlinger, ''He said that this plan would go into play after July, because that's when the new fiscal year starts at the hospital,'' adding ''that it would be a lot easier to get these benefits for us referring to the vision and the prescription card—if management or administration does not have to deal with a third party.''

As Respondent has pointed out in its brief, several potential problems were posed by the testimony of Evertse and Brentlinger, not the least of which was their conceded lack of specific recall about what Hunt had said during those meetings and their own acknowledged inattention to everything that had occurred during the one that each had attended. However, as cross-examination of Hunt progressed, his admissions posed greater problems for Respondent than the accounts of his remarks provided during the testimony of those two employees.

The outline contains only limited references to benefits: that wage and benefit increases would not automatically follow from selection of the Union as a bargaining agent, that benefits could decline as well as increase during bargaining, that, ''You want more money and better benefits. So do I,'' that among other things unions want ''Employers to switch your present employee benefits to union benefit plans,'' that a union could call a strike to try ''to force the employer to

. . . switch[ ] to a union proposed benefit plan,'' and that Respondent did not know whether, should it prevail in the election, the Union would ask Respondent to change its benefit plans. Yet, Hunt admitted that he also had brought up during the meetings ''past employee attitude surveys and especially we started a compensation benefit program.'' The outline contains no mention whatsoever of past attitude surveys of employees. Nor does it mention any specific benefits such as a compensation benefit program.

In the outline there is no mention of Respondent's fiscal year. Nor is there any specific reference in it to the month of July. But, as quoted above, Evertse and Brentlinger testified that Hunt had made mention of both subjects. In fact, he conceded, ''I told them if we did anything, it would not be until July because that was the beginning of the next fiscal year.''

The outline refers generally to employees, as well as Hunt, desiring more money and better benefits and, further, expresses Respondent's concern for employees. However, it contains no particularized references to Respondent actually looking into providing better benefits or actually considering enhancing the benefits that employees then enjoyed. Yet, as quoted above, both Evertse and Brentlinger testified that Hunt had mentioned enhancing the employees' benefits. Indeed, he admitted, ''I said we were considering enhancing benefits,'' and, also, mentioned ''other changes that we were doing.'' In fact, although the outline is devoid of mention of inquiries about specific benefits that employees might like to see enhanced, when interrogated as to whether he had asked employees at times what they would like to see as improvements, Hunt admitted, ''I believe I may have said that on occasion to where, what would you like to see as improvements.''

The foregoing testimony by Hunt provides some examples of a series of statements he admittedly had made to employees, during at least some meetings, that are not contained in the outline. Accordingly, it cannot be concluded that Hunt had done no more during those meetings than simply read, or even paraphrase, the outline's statements. Furthermore, by his own admissions, he had made certain statements that exceeded the bounds both of permissible preelection campaigning and of allowable expressions of views, argument, or opinion. However, before reviewing that testimony, to clarify some of Hunt's admitted statements, as well as for purposes of analysis, it is necessary to review the facts of the related, in the circumstances, subject to surveys conducted by Respondent.

Since 1990 three surveys, so far as the record discloses, have been conducted at Respondent. The first two—one in 1990 and another in 1992—had been conducted by Management Science Associates. According to Gerald Starr, senior vice president, operations, an admitted supervisor and agent of Respondent, those had been opinion and attitude surveys that encompassed specifically employee attitudes concerning existing wages and benefits. However, neither one had been intended to develop a proposed plan of benefits that could be implemented by Respondent. Rather, the reports resulting from them merely had recited a comparison of Respondent's overall situation, including employee benefits, to those of other hospitals in Management Science Associates' data bank. Nevertheless, those results were reported to Respondent's employees in department meetings separately conducted by each department's manager.

The most recent survey had been conducted by Hay Associates during 1992. It was an analysis of Respondent's direct and indirect compensation and consisted of three phases: meetings with focus groups during July 1992, distribution to all unrepresented employees, later that month or during early August 1992, of questionnaires regarding position descriptions, and distribution 3 months later to about 15 percent of management and nonmanagerial personnel, selected randomly, of questionnaires concerning the adequacy of existing benefits and benefits that the questioned individuals would like to see instituted. Among the benefits enumerated in the latter portion of those questionnaires were vision care and prescription drug benefits.

After completing this process, Hay Associates analyzed the information gathered and submitted a report to Respondent. Recommendations were included for benefit modifications and improvements. Starr testified that Hay's report had not been received until after the second representation election had been conducted, but Hunt testified that Respondent had received it, ''Approximately the end of December'' 1992. Initially, Hunt testified, ''somewhere on the 1st of January,'' he had communicated the substance of that report to ''senior management,'' including Starr, ''as to which of those benefits I thought we should implement.'' Later, however, he testified that, ''I have made recommendations to [senior management] probably in and about March of 1993 to senior management which included Mr. Starr, as to what I thought we should change and what the cost would be.''

It is not the discrepancies in time, however, that is one of the two crucial considerations regarding the Hay report. Rather, Hunt conceded that no decisions had been made at the time of his report to senior management about the report's recommendations. Second, of more importance, Starr testified, ''the Hay study was not done in order to report back to the employees.'' In consequence, he testified,

> [A]s I recall it, the detailed analysis of the findings and recommendations and fringe benefits were not reported back to the employees.
>
> And as I recall, a discussion occurred about that, that is, we were preparing for an election, it would be an inappropriate time to appear to be bargaining.

Turning back to Hunt's extemporaneous statements—ones not included in the outline—to employees during his meetings with them, as quoted above, he admitted having asked ''on occasion'' what benefits improvements they desired. In the course of admitting having done so, he referred to ''the results of previous surveys we had done.'' Yet, to the extent that he was attempting by that latter statement to advance a legitimate explanation for having questioned employees about desired improvements, in the course of a presentation intended to persuade them to vote against the Union in the upcoming representation election, Hunt's statement fails to accomplish that objective.

Since Respondent already possessed the information about which Hunt questioned the employees during preelection meetings with them, his questioning reexplored terrain already explored and mapped. Seemingly, neither he nor Respondent gained anything further from, in effect, resurveying

employees concerning their reasons for dissatisfaction with existing benefits. Nor does the other evidence supply any basis for inferring a legitimate reason for Hunt's questions to employees during meetings in which he tried to persuade them not to support the Union in the second election.

Hunt did not confine his extemporaneous remarks to questioning assembled employees. He also conceded that ''I wrote down what I thought the employees felt they wanted as improvements,'' which, of course, is consistent with testimony provided by the General Counsel. The very act of recording responses inherently displays an intention to take some future action on the basis of replies received to questioning about improvements sought in benefits. In fact, such an intention was articulated expressly to employees by Hunt when, first, he admittedly notified them of the Hay Associates recommendations and, second, expressly promised that benefits improvements would be forthcoming.

As to the first, despite Respondent's above-described decision not to relate to employees the details of Hay's recommendations, Hunt testified that he had recited to groups of employees that ''we started a compensation benefit program,'' and also had told employees

> what the Hay group had reported back to us as far as what our employees wanted. I reported back to them that the Hay group had told us that employees wanted a vision plan and wanted a prescription drug plan and wanted a few other things.

Of course, both Evertse and Brentlinger testified, as described above, that vision and prescription drug plans had been ones specifically singled out by Hunt during his meetings with the group in which each of them had been included. Yet, at no point did Hunt explain why he had chosen to disregard Respondent's decision to avoid discussing Hay's report with employees, for fear of creating an appearance of trying to bargain with them.

Second, not only did Hunt, as quoted above, admit having told employees ''we were considering enhancing benefits,'' but he also admittedly ''told them about other changes that we were doing that had come out of the surveys that had been done in the past, as well as the consultant we had hired had made these suggestions, and out of that I told them there would be some changes.'' Although Hunt added hastily, ''I didn't tell them everything was going to be better,'' the fact is that he had expressly promised ''some changes'' as a result of the already conducted survey or surveys and had said that Respondent was ''considering enhancing benefits.'' Given those remarks, one need not be a Cardozo to make the connection that the ''changes'' being contemplated involved ''enhancing benefits.'' Indeed, Hunt did not confine his promises to benefit enhancements, but admittedly he had ''also told them about our proposed changes with the pay for performance plan, the performance appraisal system,'' although at no point did Respondent explain what those particular changes would entail. For that matter, at no point did any of the Respondent's witnesses testify that those specific items had been embraced by Hay's survey.

Hunt's promises were not concrete. They were carefully hedged ones. He did not commit Respondent to any specific benefit enhancement or addition. As quoted above, he informed the employees ''if we did anything, it would not be until July because that was the beginning of the next fiscal year.'' It also, of course, would be a month well after the one in which the second election would be conducted. Hunt added one further qualification to his promises.

He admitted that in the course of telling employees ''there would be some changes,'' he had ''told them that anything that would happen if the [U]nion was voted in would be subject to negotiations.'' Obviously, that particular remark was one made in a presentation that included the outline's statements that should the Union win the election, it would be ''difficult to tell'' when bargaining might begin, as ''Legal objections to conduct of elections sometimes delay bargaining for years,'' and, further, no one could say how long negotiations might last before, if ever, agreement was reached on a contract's terms.

In sum, notwithstanding the less than precise recollection of Evertse and Brentlinger, there is no reliable basis for concluding that, during his 34 meetings with groups of employees, Hunt had not read or paraphrased the statements printed in the outline prepared for him. However, his own above-described admission establishes that, at least at some of those meetings, he had addressed additional remarks to employees. Since those admissions were elicited during cross-examination, it is not possible to conclude the precise order of his prepared and additional statements to employees at the meetings. Indeed, his own testimony shows that his extemporaneous statements may have been made at different points during the various meetings. What can be concluded, however, is that at some meetings, if not all, eight messages, to the extent pertinent here, were communicated to the assembled employees.

First, that the meeting's purpose was to discuss the Union's organizing effort and the March 9 second or rerun representation election arising as a result of it. Second, that if the Union prevailed in that election, it would become the employees' bargaining agent but, given possible legal objections to the election's conduct, it could not be predicted when bargaining would begin and, once it did commence, no one could say how long, if ever, it would take to reach agreement on a contract's terms. Third, that he wanted to know what benefits employees desired, writing down ones that he perceived employees as desiring. Fourth, that Respondent had undertaken a compensation benefit program, as part of which a survey had been conducted which showed that employees desired a vision plan, a prescription drug program, lower health insurance premiums, and additional dental benefits. Fifth, that Respondent was considering instituting or improving those benefits, as well as programs for performance appraisals and pay, had hired a consultant to suggest changes, and that ''some changes'' would be made. Sixth, that while enhancements to existing benefits or any additions to them could not be implemented until at least the beginning of Respondent's next fiscal year on July 1, selection of the Union in the election could delay their implementation, and possibly even their institution, for a prolonged period due to the election objection and subsequent negotiation processes. Seventh, that ''only you and I really care'' about the problems at a big institution like Respondent, at which problems will always arise, and ''only you and I can solve those problems.'' Finally, that Respondent ''asks for your vote and hopes that you mark your ballot in the box labeled NO.''

Evaluation of those messages involves, in reality, consideration of three areas encompassed by Section 8(a)(1) of the Act. The first, covered by the complaint and by the objections, is that of solicitation of grievances and complaints in response to an organizing campaign and, more particularly, a representation election. Consideration of that issue arises, of course, because of Hunt's sometime questioning of employees at meetings about improvements they desired. Had he done no more than direct such questions to employees, there might be no basis for concluding that Section 8(a)(1) of the Act had been violated. ''An expressed willingness to listen to grievances is not sufficient to constitute a violation.'' (Citation omitted.) *Idaho Falls Consolidated Hospitals v. NLRB*, 731 F.2d 1384, 1387 (9th Cir. 1984).

Such questioning clearly does violate the Act whenever coupled with an express or implied promise to, at least, consider and try to correct the sources of employee dissatisfaction. ''Grievance solicitation during the preelection period . . . constitutes an unfair labor practice if the employer also promises or implies that it will remedy the grievance if the union is rejected . . . or if its promise or implication otherwise serves as an inducement to vote against the union.'' (Citations omitted.) *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1474 (10th Cir. 1973). Consequently, in evaluating the legality of Hunt's questioning, the significant predicate is whether or not he also expressly or impliedly promised, or at least led employees to believe, that Respondent intended to remedy, or at least consider remedying, what employees perceived as deficiencies in their benefits.

The area of promise under Section 8(a)(1) of the Act is not addressed in this case exclusively in connection with that of solicitation of employee grievances and complaints. It also is alleged as an independent violation of that subsection's general proscription. As a result, this second area must be considered on its own, as well as in the context of grievance and complaint solicitation.

Like the vice inherent in an actual conferral of benefits, a promise of benefits, made in response to initiation of an organizing campaign or in anticipation of a representation election, violates the Act because, ''[e]mployees are not likely to miss the inference that the source of benefits now conferred [or promised] is also the source from which benefits must flow and which may dry up if it is not obliged.'' *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409–410 (1964). To impress that inference on its employees, an employer's promise need not be express. As pointed out above in *Presbyterian/St. Luke's*, a promise that is implied is equally pernicious. Based on his own admissions, in the course of speaking during at least some preelection meetings with employees, Hunt made both express and implied promises to them.

That Hunt made express promises is shown by the foregoing fourth and fifth summarized messages from Hunt's speeches and the evidence underlying them. That is, Hunt told employees that Respondent had commissioned a survey that had disclosed employee desires for certain enumerated additional benefits. He also told them that Respondent had retained a consultant who had suggested changes. Finally, he specifically promised that ''some changes'' would be made.

Promises that were implied by Hunt arise from the evidence underlying the third through fifth above enumerated messages. Even had Hunt not said specifically that ''some changes'' would be made, he had asked what benefits employees desired, had written down ones that he perceived they desired, had pointed out that Respondent had already undertaken a compensation benefit program that included a survey of benefits desired by employees, had announced that Respondent retained a consultant who had suggested changes, and had further announced that Respondent was considering instituting or improving benefits. To be sure, the evidence must show not only that promises, express or implied, were made, but, also, must show that those promises could be viewed, by an objective standard, as connected to discontinuance of employee support for representation. Several factors about Hunt's speech do demonstrate as much.

First, based on the outline's prepared statement, Hunt had told the employees that his purpose for meeting with them had been to discuss the Union's organizing effort and the upcoming election. Further, based on the outline, his concluding prepared remark was an appeal for employees to ''mark your ballot in the box labeled NO.'' Consequently, Hunt's promises had been made in the course of speeches that ''stated opposition to employee unionization'' and stated an ''invitation to employees to vote against the Union.'' *NLRB v. Windsor Industries*, 730 F.2d 860, 864 (2d Cir. 1984).

Second, while Hay Associates and, before it, Management Science Associates had surveyed employee attitudes regarding, inter alia, benefits, there is no evidence that Respondent's director of human resources, or any other official of Respondent, had ever personally and directly done so. Yet, as Hunt admitted, during some meetings he had questioned employees about benefit improvements they desired. ''It is well established . . . that an employer cannot rely on past practice to justify solicitation of employee grievances if the employer significantly alters its past manner and methods of solicitation during the union campaign.'' (Citation omitted.) *House of Raeford Farms*, 308 NLRB 568, 569 (1992).

Indeed, not only was Hunt's surveying of employee attitudes novel, but so, too, were his announcements about Hay's survey results concerning employee attitudes. Starr testified that Management Science's surveys had been confined to employee attitudes:

> Q. So the Management Science report was to reflect employees' attitudes?
>
> A. That's correct.
>
> Q. Not to come up with a proposed plan of benefits that at some point may be implemented?
>
> A. That's correct.

Hay's survey had done so, thereby differentiating it from previous surveys. Although Respondent had made a decision not to discuss the Hay survey and resultant report with employees prior to the election, Hunt admittedly had done so. In consequence, that discussion by Hunt disclosed an aspect of surveying that was novel for employees—that differed as much from past practice as the type of meetings in which those discussions were conducted by Hunt.

Third, Hunt's remarks were specific as to the types of benefits, such as vision plan and prescription drug program, although not as to when, or even whether, specific programs were firmly to be instituted. Further, he admittedly told employees, inter alia, that those specific benefit enhancements

were being considered not only as a result of the Hay survey, but also because of a consultant's suggestions. An indicia, at least, of implied promise exists whenever, in a preelection setting, an employer makes statements that are not simply ''general and vague,'' such as enhancements are ''a good idea or that [the employer] would at some indefinite time look into [them],'' but instead ''communicate[s] to the assembled [employees] that'' enhancements of specific benefits are ''under active study or consideration by the [employer].'' (Citation omitted.) *Pennsy Supply*, 295 NLRB 324, 325 (1989).

Further indication to employees of a nexus between implementation of enhanced benefits and rejection of the Union in the election is supplied by Hunt's statements that while benefit enhancements could not be implemented by Respondent until at least July 1, selection of the Union by a majority in the election would subject any benefit changes to negotiations. Not only might negotiations be prolonged, Hunt told the employees, but even their initiation might be delayed by objections to the election's conduct. Of course, if the Union prevailed in the second election, those objections could only be ones filed by Respondent.

In sum, Hunt made both express and implied promises of improved benefits to employees during his speeches. Further, those promises were made in a context, and in the company, of other remarks that, measured by an objective standard, created a nexus between rejection of representation by the Union and implementation by Respondent of such enhanced benefits. To be sure, there had been prior surveys of employee attitudes and Respondent's compensation benefit plan, which had bred Hay's survey, had been in progress at the time of the election and of Hunt's preelection statements to employees. Yet, turning to the third pertinent area under Section 8(a)(1) of the Act, this is not a situation where Hunt did no more than publicize an ongoing process arising from a predetermined benefit enhancement program. That is, it cannot be concluded that he had only been ''pointing with pride to an already implemented process as a basis for seeking support in the representation election.'' *Nissan Motor Corp*., 263 NLRB 635, 640 (1980).

The Board has held that nothing in the Act prevents an employer from publicizing an existing benefit, even one of which employees may not have been fully aware, as ''a legitimate campaign strategy necessary to counter the union's claim that it offers better benefits.'' *Weather Shield of Connecticut*, 300 NLRB 93, 96–97 (1990). See also *Schwab Foods*, 223 NLRB 394, 397–398 (1976). Indeed, an employer may even lawfully announce during the preelection period improved benefits that have become concretized as a result of an already initiated and ongoing process. *NLRB v. Tommy's Spanish Foods*, 463 F.2d 116, 119 (9th Cir. 1972); *Southbridge Sheet Metal Works*, 158 NLRB 819 (1966), affd. 380 F.2d 851 (1st Cir. 1967). Here, however, Hunt went further in his speeches than permitted by those cases.

By the time that he had addressed employees, the only steps that had been accomplished, as a result of the compensation benefit plan, had been completion of Hay's survey and submission of its recommendations to Respondent. Concededly, Respondent's senior management had made no final determination regarding enhancement of specific benefits. In fact, there is no evidence that its senior management had made a determination to enhance any benefit, whatsoever. Consequently, there is no basis for concluding that Hunt's benefit promises pertained to enhancements ''already existing or that [Respondent] had made a binding commitment to put . . . into effect regardless of the outcome of the election.'' (Footnote omitted.) *NLRB v. Arrow Electric Co*., 573 F.2d 702, 705 (1st Cir. 1978).

To the contrary, Hunt specifically told employees that no benefit enhancements could be implemented until July 1, almost 4 months after the announcement of the tally of, at least, unchallenged votes in the March 9 election. Moreover, as pointed out above, he not only told employees that any enhancements would be subject to negotiation if a majority selected representation, but in the context of his remarks about possible prolongation of initiation and conduct of bargaining, any implementation of benefit enhancements, should a majority vote for the Union, was portrayed by Hunt as possibly being delayed well beyond July 1.

Not only had there been no determination by Respondent to enhance any benefits provided to employees by the time that Hunt addressed them, but Respondent has made no showing ''of a proper business purpose or necessity for the timing of [Hunt's] announcement[s]'' concerning their possibility. *J. P. Stevens Co. v. NLRB*, 461 F.2d 490, 493–494 (4th Cir. 1972). Inapplicability of the predetermination announcement doctrine to Hunt's remarks is reinforced by the contrast between his preelection meetings and the past departmental basis for conveying survey results to employees, *NLRB v. Rich's of Plymouth, Inc*., 578 F.2d 880, 883 (1st Cir. 1978), by the fact that some benefits discussed by Hunt were different in kind from those then being enjoyed by Respondent's nonprofessional employees, *NLRB v. K & K Meats*, 640 F.2d 460, 466 (3d Cir. 1981), and by the fact that Hunt made the benefits statements during ''a meeting called for the purpose of urging employees to reject a union.'' *Faith Garment Co. v. NLRB*, 630 F.2d 630, 632 (8th Cir. 1980).

Therefore, I conclude that a preponderance of the evidence establishes that Respondent violated Section 8(a)(1) of the Act by unlawfully promising benefits to employees to dissuade them from voting for the Union and by soliciting their desires about benefit enhancements in the context of those promises. To be sure, those statements may not have been made at every one of Hunt's 34 meetings with Respondent's employees. Yet, before resolution of the 12 remaining challenges from the first election, a swing of but 7 votes in that election would have left the Union with a 1-vote advantage. In fact, as described above, the outline mentioned expressly that the votes of ''only a few'' employees in the second election ''could control the future of everyone.'' Accordingly, it cannot be said that the impact on unit employees of Hunt's unlawful statements are somehow mitigated by the fact that he may not have directed them to employees at every one of the 34 meetings that he had conducted. Therefore, I conclude that his unlawful remarks destroyed the laboratory conditions of the second election.

C. *The Asserted Acts of Surveillance*

With respect to the Union's preelection activity outside of the employee parking lot during the closing days before the second election, the General Counsel and the Union presented evidence pertaining to two of those occasions: the afternoons of March 2 and 8. As to the first date, Michael

Capps, a former employee of Respondent whom it terminated in 1991, testified that as the leafleting had progressed that day, it had been watched by security guards and that one of them told the leafleters they ''were trespassing, this was private property, we were harassing the employees and they were threatening us with the police.'' The guards also, testified Capps, ''point[ed] their fingers at us, telling us to stay on the sidewalk, stay out of the driveway entrance and threatening us with arrest.'' In fact, Capps testified, the police did arrive that day and, according to Capps, he had overheard one guard telling them that the leafleting ''were out of harassment, we were trespassing and we were on private property and he wanted us removed or arrested.''

Leaflets were being offered to employees departing work for the day as their vehicles reached the parking lot's entrance/exit. Capps testified that, as this was taking place on March 2, one of the guards had been standing to the rear of the departing vehicles and, with a camera that he was holding, photographed the rear license plates of vehicles whose occupants accepted leaflets or otherwise indicated support for the Union, such as by giving ''a V, victory sign'' or shouting ''union, yes'' or ''right on.'' In addition, testified Capps, two guards were jotting down license plate numbers.

Capps also testified that he had observed Starr and another man standing on top of the older hospital building, ''[s]everal hundred feet'' across from the parking lot's entrance/exit. According to Capps, Starr had a pair of binoculars and, for about 30 minutes, ''was observing the activities that were taking place in the east parking lot.'' Capps testified that he had pointed out the people on the roof to Union President Kelly who also had been present in the parking lot that afternoon.

In fact, Kelly was the only other witness called by the General Counsel who described the leafleting on March 2. He agreed that, as he had been leafleting departing vehicles that afternoon, his attention had been directed by Capps to ''the two guys on the top of the roof.'' Kelly testified that he had ''looked up, seen the two guys and just went on with my leafleting.'' According to Kelly, when he had seen them, the two men were ''just standing on the roof looking over our way,'' but he had not seen either one holding a pair of binoculars nor, for that matter, had he seen either one holding anything in his hand.

That was not the sole testimony by Capps that Kelly did not corroborate. He made no mention of the police arriving that day, nor of any guard addressing remarks to police or to leafleters, nor of any guard having photographed license plates of departing employees' vehicles. Further, Kelly did not testify that any guard had jotted down license plate numbers of employees' vehicles. In fact, he did not corroborate even Capps' assertion that six guards had been present during that afternoon. Instead, testified Kelly, ''I believe there was [sic] three there at that one time''—''one particular guy that I remember was standing in the driveway facing us about probably 20, 30 feet away'' and the other two were riding around and came up in ''a little golf cart.'' Moreover, according to Kelly, the first guard had been ''just standing [in the driveway] with his hands behind his back watching what was going on.''

Capps made plain his antagonism toward Respondent and, based on my observation of him as he testified, I do not think that he was testifying candidly. Certainly, at least some of the matters that he claimed to have observed should have been plainly apparent to Kelly. Yet, neither he, nor any other witness, corroborated Capps's description of threats by guards, appearance of the police, photographing, and jotting down of license numbers on March 2.

Nor do I credit the testimony that Starr, or any other official of Respondent had been observing the union activity that day through binoculars from the facility's rooftop. Again, Kelly did not corroborate the testimony that such conduct had been occurring. He did, of course, confirm the testimony that two individuals had been up there. However, Starr gave testimony showing that there was no ulterior reason for his presence there.

Starr testified that, as part of his duties as vice president, operations, he ordinarily went up to the hospital's roof ''to walk around, see if mainly the rooftops are clean, haven't got any loose doors on air conditioning units, those kinds of things and then leave.'' Additionally, approximately 90 percent of the hospital's buildings had been reroofed from the fall of 1992 through the late spring of 1993. With regard to that particular project, testified Starr, he once had gone to the roof with someone from the construction company and had ''spent 15 or 20 minutes up there'' in connection with demolition of the existing roof. He testified that that had been the only time that he had been on the roof with anyone else during the preelection period. He also denied ever having gone to the hospital's roof with binoculars. Given that testimony, and the unreliability of that given by Capps, there is no credible basis for concluding that Starr, or any other official of Respondent, had watched union activities in progress through binoculars from the hospital's rooftop on March 2. Moreover, there is insufficient basis for concluding that Starr had been present there for an improper purpose on March 2, when he had been pointed out to Kelly.

A very different conclusion is warranted by a preponderance of the evidence concerning the Union's rally on March 8. The General Counsel and the Union argue that the evidence shows that, on that date, an unusually large number of guards had been observing the rally and, further, that notations had been made of what appeared to be license plate number of departing vehicles whose occupant accepted leaflets and/or balloons from the Union's supporters, or who otherwise indicated support for the Union, such as by calling out remarks favorable to it. That evidence, they argue, establishes that Respondent engaged in unlawful surveillance—or, at least, unlawfully created the impression of it—by virtue of intensified observation of union activity that day by guards, see, e.g., *Impact Industries*, 285 NLRB 5 fn. 2, 19–21 (1987), and by virtue of recording license numbers of vehicles whose occupants appeared supportive of the Union.

Aside from Capps, the General Counsel presented three other employee-witnesses who had been present at the March 8 rally: Evertse, Brentlinger, and food service worker Stanley Davis. Abstracts of their accounts do disclose inconsistencies and conflicts among them regarding events that day—a fact not overlooked by Respondent in its brief. However, unlike Capps, I felt that Evertse, Brentlinger, and Davis were attempting to testify candidly. It seemed to me that inconsistencies and conflicts among their accounts were a result of lack of full attention to events surrounding their participation in the rally and of failure to recall perfectly what they had seen that afternoon. To be sure, perception and recollection

are no less credibility considerations than honesty in evaluating testimony. Accounts by witnesses whose perceptions are impaired or whose recollections are imperfect cannot be relied on to the extent of those impairments or imperfections. Nevertheless, unlike failure to testify truthfully, accounts of such witnesses must be considered and are subject to heightened scrutiny only, not to complete disregard.

The accounts of Evertse, Brentlinger, and Davis do establish that more than the usual number of guards had been present, watching the rally, on March 8. At that time the guards were employed by an independent firm which had a contract to supply guards to Respondent's hospital. There is no contention, however, that they had not been acting in Respondent's interest on March 8. As to the number of guards who typically worked around the emergency room, located approximately 100 feet across the parking lot from 34th Street, Starr testified, ''at that time we would have had two in the day, two in the evening and one at night.'' In addition, according to Starr, ''The contract provisions provide for a security supervisor in the hospital and I believe a shift supervisor.'' However, there is no evidence that the security supervisor ordinarily leaves the hospital to patrol the area outside of it. Nor is there evidence that the shift supervisor usually patrolled the premises. Finally, there is no evidence that the two day-shift guards ordinarily stationed themselves for prolonged periods in, or in the vicinity of, the employee parking lot.

Evertse testified that she had seen four or five guards watching the rally during the approximately half hour that she had attended it. So, also, did Davis who had been there, he estimated, for 2 or 2-1/2 hours that day. Brentlinger had been there from approximately 1:30 p.m. until around 4:10 p.m. She testified that she had seen a total of six guards during that time. Obviously, those numbers represent double, based on the lowest number about which there is testimony, and possible triple, based on Brentlinger's testimony, the number of guards ordinarily stationed at Respondent's facility during the day shift. Even taking into account the shift and security supervisors, a fifth and, possibly, a sixth guard would still exceed the number of security personnel usually working days at the hospital.

Respondent produced evidence that security at the hospital had been intensified in late February or early March as a result of thefts from a construction project adjoining the employee parking lot and, moreover, because of a threat to ''get even'' with emergency room personnel made by the father of a child who had passed away after being treated and released from there. Respondent also presented evidence of a history of vandalism in that parking lot and, further, of an incident when the police had been called in response to a fight between an employee and someone picketing at Respondent. In fact, Starr testified that after the latter incident, he had issued instructions that guards be particularly vigilant. Yet, Respondent produced no specific evidence that those events, or any one of them, had prompted the decision to assign a seemingly unusually high number of guards to observe the Union's afternoon rally on March 8.

In that regard, it is important to bear in mind that ''Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position.'' (Citation omitted.) *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). Consequently, even where valid grounds may exist for an employer's particular action, their mere existence, absent evidence by the employer connecting them to the action that it took, does not allow the trier to conclude that, in fact, those grounds actually had been the basis for that action. ''The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.'' *Inland Steel Co.*, 257 NLRB 65 (1981).

Those principles guide evaluation of the evidence pertaining to the surveillance allegations and objections in the instant case. Starr testified that when security is intensified or heightened at Respondent, ''we've typically added one more person per shift,'' but he conceded, ''I don't know exactly if that's what we did at that time or not.'' Aside from the security and shift supervisors, the official who might have been able to supply a more particularized explanation—both as to the specific steps taken to intensify security in light of the above-described incidents and concerning the unusually high number of guards present during the March 8 rally—was, as Starr put it, ''A gentleman named Rantham.'' On March 8 he had been employed as director of health services at Respondent by a firm, Service Master, that has a contract for supervision of Respondent's dietary and facilities support areas. In that capacity he had been responsible in the first instance for security at Respondent's hospital.

According to Starr, to intensify security, Rantham ''gave me an increased number [of guards] that he was going to add,'' but Starr admitted that ''I don't recall'' the number of guards that Rantham had said that he intended to add. Rantham was never called as a witness. Although Respondent adduced evidence that he was no longer working at its hospital, Respondent never represented that Rantham was unavailable to it as a witness. Indeed, there is every indication that Rantham was available to explain how he had intensified security at Respondent. For, Starr acknowledged not only that, as of the hearing, Rantham was ''still in the community,'' but, also, is ''the spouse of a person employed at the hospital.'' Yet no explanation was advanced for failing to call him as a witness.

In some situations evidence that is presented might allow an inference as to an employer's reason(s) for particular action, such as assigning as many as six guards to watch the Union's afternoon rally on March 8. Given the record in the instant case, however, a conclusion of legitimate reason would rest on nothing more than speculation. Respondent did not contend that the Union or its supporters had stolen materials and equipment from the construction site. Nor is there evidence that those thefts had occurred during daytime hours. Similarly, there is no evidence that it had been during daytime hours that vandalism had been occurring in the employee parking lot. So far as the record discloses, the parent who had uttered the threat against emergency room personnel had not been an employee of Respondent. And, as stated above, the emergency room is approximately 100 feet across the parking lot from the sidewalk where the rally had been in progress on March 8.

There is no dispute about the occurrence of a fight that involved a picketing employee. Still, Starr admitted that he had received only ''one report, about an altercation at that point in time.'' He did not testify about any like reports at any other time. Nor did Respondent adduce evidence of any other incidents or altercations, nor of other misconduct, involving

union supporters. To the contrary, Assistant to the President Jan Van Boening testified that on the one occasion in March when he had gone to the parking lot entrance/exit and had asked two leafleters to move off Respondent's property to the sidewalk, ''they said, sure, no problem and they moved.'' In sum, there is no evidence of repeated acrimonious, or even improper, acts by the Union and its supporters, nor of repeated acts of trespass that provoked incidents justifying, viewed from the employees' perspective, the presence of so unusually high a number of guards during the afternoon union rally on March 8.

That heightened number of guards was not the sole unusual aspect of the guards' presence in the employees' parking lot on that date. In addition to Capps, the three other employee-witnesses testified that notes had been taken of what appeared to be license plate numbers of vehicles whose occupants accepted leaflets and/or balloons, or otherwise indicated support for the Union. To be sure, the individual accounts were not identical and, consequently, were not necessarily corroborative as to any individual guard. On the other hand, there had been four to six guards present that afternoon and the employees had been marching back and forth along the sidewalk, from one end of Respondent's property on 34th Street to the other, during a rally that lasted approximately 2 hours. In those circumstances, variances between specific observations are not inherently indicative of lack of candor. Rather, they can be attributed with equal force to observations of different guards from separate perspectives at different times over the course of that afternoon.

For example, Evertse testified that she had observed one guard, standing approximately 30 or 40 feet from the driveway and approximately 20 feet from the sidewalk, writing down something, although she could not see what it was. However, she had been at the rally for approximately 30 minutes and had been marching during that time. Evaluated by an objective standard, her observations would have been limited both by time and location.

Brentlinger testified that she had observed an individual writing down information after looking at the rear of vehicles leaving the parking lot. She described that individual as a person wearing a suit and identified him as Van Boening. He credibly denied having engaged in such conduct and, moreover, denied having been in the employee parking lot that afternoon. However, the credibility of his denials does not mean that Brentlinger's description of someone writing down what appeared to be license plate numbers cannot be credited. At least some guards had to be unfamiliar to the employees, given the added numbers present at the rally that afternoon. Van Boening had only started working for Respondent on January 1 and, accordingly, was not as familiar to employees, based on length of service and possibly also on day-to-day contact with them, as the longer-employer Starr and, even, Hunt. With respect to her testimony about the suit, not only is it undisputed that the guards had been wearing white shirts, ties, and dark pants, but Starr testified, ''They were wearing blazers at that time.''

As discussed in subsection III,B, supra, Brentlinger's description of Hunt's remarks, during the preelection meeting that she had attended, while not a complete account of what he had said that day, had been largely corroborated by Hunt's admissions when he later testified. Although her perception may have been colored by a mistake as to the exact identity of the notetaker she saw on March 8, I felt she was being candid regarding that aspect of her observation. Furthermore, her testimony about notes being made of what appeared to be license plate numbers tends to be confirmed by the credible testimony of food service worker Davis.

He described two guards—a Hispanic male and a younger Caucasian male—whom he had seen writing down notes on pads whenever a departing vehicle's occupants accepted leaflets and/or balloons, or whenever they indicated support or the Union in some other fashion. Similar to Brentlinger's description, Davis testified that the guards he had seen had first looked at the rear of those vehicles before writing on their pads.

The fact is that Respondent never presented any evidence contradicting those descriptions of notetaking by guards on March 8. It did present testimony that no directions had been issued to record license plate numbers of apparent union supporters and, also, that no lists of license plate numbers had been turned in to Starr, at least, following the rally. Yet, absence of such added features does not diminish the inhibition on employee communication with a union that is inherent in the action of recording license plate numbers of vehicles whose occupants appear to display receptivity to a labor organization's overtures. See *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981). That the guards may not have been expressly authorized by Respondent's higher management to record those license numbers does not diminish the coercive effect on employees who witnessed the guards doing so in the apparent interest of Respondent.

As is true of the unusually high number of guards stationed at the Union's March 8 rally, Respondent has presented no evidence of a legitimate reason for recording, or appearing to record, license plate numbers of vehicles whose occupants displayed favoritism toward the Union. Given the absence of evidence of a legitimate purpose, and in light of the inherent adverse effect of such actions under the circumstances on employee activities protected by Section 7 of the Act, I conclude that by that conduct on March 8, Respondent violated Section 8(a)(1) of the Act and, further, engaged in conduct that disrupted the laboratory conditions of the following day's election.

CONCLUSION OF LAW

Bakersfield Memorial Hospital, a statutory health care institution and employer, has committed unfair labor practices affecting commerce by promising benefit improvements to employees and by soliciting employee desires for benefit improvements, in conjunction with those promises, to dissuade employees from supporting International Brotherhood of Teamsters, Local No. 87, AFL–CIO, and, further, by engaging in surveillance and by creating the impression of surveillance of employees' union activities, thereby violating Section 8(a)(1) of the Act and, furthermore, engaging in conduct that destroyed the laboratory conditions for the representation election on March 9, 1993.

REMEDY

Having found that Bakersfield Memorial Hospital engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be

ordered to take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Bakersfield Memorial Hospital, Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Expressly or impliedly promising benefits to employees and soliciting from employees their desires for benefit improvements, in conjunction with those promises, to dissuade employees from supporting International Brotherhood of Teamsters, Local No. 87, AFL–CIO or any other labor organization.

(b) Engaging in surveillance and creating the impression of surveillance of employee activity on behalf of the above-named labor organization, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Bakersfield, California hospital copies of the attached notice marked ''Appendix.''[3] Copies of that notice on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by it immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

IT IS RECOMMENDED that the objections to the election conducted on March 9, 1993, in Case 31–RC–6923 be sustained, that the results of that election be set aside, and that Case 31–RC–6923 be severed from Case 31–CA–19878 and remanded to the Regional Director for Region 31 so that another election can be scheduled and conducted.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT expressly nor impliedly promise benefits to you to dissuade you from supporting International Brotherhood of Teamsters, Local No. 87, AFL–CIO or any other labor organization.

WE WILL NOT solicit your desires for benefit improvements, and expressly or impliedly promise to grant or consider granting those improvements, to dissuade you from supporting the above-named labor organization, or any other labor organization.

WE WILL NOT engage in surveillance of your union activities and

WE WILL NOT create the impression that we are engaging in surveillance of your union activity.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

BAKERSFIELD MEMORIAL HOSPITAL

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''